that an order was made by the court below that the appellant pay the respondent $100 per month with effect from October 1, 1966 arising from which the present appeal arose. She alleged that the payments were in arrears from August 1968. The respondent had served notice on the appellant for the arrears in June 1967 for the sum of $400. It was duly paid. The record showed that the due process of the law was not resorted to until February 14, 1977 when the President Sessions Court made the order appealed against.

There were basically three grounds of appeal. It was contended firstly, that the learned President Sessions Court was wrong in his conclusions on the facts that the appellant had failed to maintain the respondent. Secondly, that the court had no jurisdiction to make an order for $11,000 since it exceeded his jurisdiction. Thirdly, that the learned President had failed to consider the principle laid down in *Pilcher* v. *Pilcher*[1] where arrears as a matter of practice are allowable only for a period of one year.

I do not think I need say more on the first ground except that in my humble view the learned President Sessions Court had come to his decision correctly that the appellant had not made due payment to the respondent by reason of which the court below made the order ordering him to pay. Much was said of the fact that the learned President Sessions Court had failed to consider the fact that she had made substantial deposits with some financial institutions or another from money which traced itself to none other than the appellant. The respondent had explained in the court below the sum as having been received from the sale of her property in India. That may or may not be so but the learned President Sessions Court believed her. I have no reason to find that he was wrong in his conclusion. There was nothing to suggest that the sale had not taken place or that she had not received them but what I think made him decide against the appellant was the fact that the payment ordered to be paid in court was to be deposited in court. If in fact the order was duly complied with it was strange that he had not produced any receipt to evidence it as the court would duly have issued one.

There are two grounds on which I would allow the appeal. Firstly, because the President Sessions Court had apparently not considered the principle laid down in *Pilcher* v. *Pilcher* stated above by which it had been held following the principle enunciated in *Kerr* v. *Kerr*[2] that it had been the practice of the Divorce Division to order payments of arrears unless there are special circumstances for period not exceeding one year. The rationale behind this lies in the fact that the court treats the payment as a fund for maintenance and not as property. The principle was followed by Pawan Ahmad J. in *Amrick Lall* v. *Sowbaiavati.*[3] I do not see why in our case we should depart from that common law practice. Neither are there any special circumstances which would merit it.

Be that as it may the appeal should be allowed because it would appear the President Sessions Court had no jurisdiction to make the order which he did. The order was made under the Subordinate Courts (Amendment) Act, 1978 which came into effect on July 1, 1978 but the order itself was made on March 6, 1978 nearly four months earlier. The amendment empowered him to make an order for an amount not exceeding $10,000. He was empowered only therefore at the relevant time to make an order not exceeding $2,000 which was the law before the amendment. I would therefore allow the appeal and vary the President Sessions Court's order and award the sum of $1,200 instead as the arrears of maintenance for a period of one year.

Order accordingly.

Solicitors: *Tan Chin Yong & Appaduray; Au Ah Wah & Co.*

TAN TIK SING v. GOMEZ DEVELOPMENT CO. SDN. BHD.

[O.C.J. (Ajaib Singh J.) August 20 & December 14, 1978]
[Muar — Civil Suit No. 125 of 1978]

Practice and Procedure — Summary judgment — Application for — Failure of applicant to verify that "in his belief there is no defence to the action" — R.S.C. 1957, O. 14 r. 1(a), O. 14A r. 1(1).

On June 6, 1978 the plaintiff by a specially indorsed writ sued the defendants for specific performance of an agreement of sale dated August 18, 1973 in respect of a piece of land and a house to be erected thereon. The plaintiff claimed that under the agreement the defendants were required to build the house and transfer it to him on or before August 18, 1975 but the defendants had failed to do so. The defendants in their defence stated that there was an implied condition precedent that the commencement of the construction of the house on the land was subject to the approval of the local authorities which was granted to them only on November 29, 1977. The defendants also contended that the agreement became incapable of performance because of the delay on the part of the local authorities whereby the cost of building materials and labour had escalated rendering the contract voidable.

Nowhere in the affidavit in support of his application for summary judgment nor in his affidavit in reply to the defendants' affidavit did the plaintiff state that in his belief there was no defence to the action.

Held, dismissing the plaintiff's application: (1) the clear provisions of Order 14 rule 1(a) and Order 14A rule 1(1) are mandatory and they must be complied with if a plaintiff wants to get judgment without any trial whatsoever;

(2) in the present case the plaintiff had failed to say on affidavit that in his belief there was no defence to the action. The plaintiff's application for summary judgment under Order 14A was therefore deficient for want of compliance with rule 1(1) of the order.

Case referred to:-

(1) *Daiman Development Sdn. Bhd.* v. *Mathew Lim Chin Teck* [1978] 2 M.L.J. 239.

SUMMONS-IN-CHAMBERS.

Chua Jui Meng for the plaintiff.

M.S. Miranda (*Thara Singh Sidhu* with him) for the defendants.

Cur. Adv. Vult.

Ajaib Singh J.: In an application for summary judgment under Order 14 or Order 14A of the Rules of the Supreme Court the person making the affidavit in support must verify the cause of action and state that in his belief there is no defence to the action.

Failure to do so is fatal to any application for summary judgment. Indeed the court of a judge to whom an application for summary judgment is made may not even consider the application if the person making the affidavit in support is not prepared to verify the cause of action on oath and say that in his belief there is no defence to the action. No less important is the requirement that the person who makes the affidavit must be the plaintiff or any other person who can swear positively to the facts.

The application in this case was one under Order 14A rule 1(1) which reads as follows: —

"In any action commenced by writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages, for recission or for the forfeiture or return of the deposit, the plaintiff may (whether the defendant has appeared or not), on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the court or a judge for judgment and the court or judge may thereupon give judgment in the action unless the defendant by affidavit, or by his own viva voce evidence or otherwise, satisfies the court or judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the court of judge, to entitle him to defend."

On June 6, 1978 the plaintiff by a specially indorsed writ sued the defendants for specific performance of an agreement of sale dated August 18, 1973 in respect of a piece of land and a house to be erected thereon. In his statement of claim he alleged that under the agreement the defendants were required to build the house and transfer it to him on or before August 18, 1975 but the defendants had failed to do so. Further and alternatively he claimed damages in lieu of or in addition to specific performance. In their defence filed on July 25, 1978 the defendants stated that there was an implied condition precedent that the commencement of the construction of the house on the land was subject to the approval of the local authorities which was granted to them only on November 29, 1977. Secondly they contended that the agreement became incapable of performance because of the delay on the part of the local authorities whereby the cost of building material and labour had escalated rendering the contract voidable. On August 20, 1978 the plaintiff applied by summons-in-chambers for summary judgment in his action for specific performance. In support of his application he filed a lengthy affidavit and annexed to it the agreement of sale as well as a number of letters and receipts. In this affidavit the plaintiff particularly stressed that under the agreement which was executed on August 18, 1973 the defendants were to construct the house and have it transferred to the plaintiff together with the land on or before August 18, 1975 but the defendants had failed or neglected to do so. By letter dated March 13, 1978 the defendants intimated to the plaintiff that they were not willing to construct the house at the price mentioned in the agreement. The plaintiff affirmed that he was ready and willing to perform his part of the agreement. He had already paid a total sum of $8,916 towards the purchase price and had also contributed towards the charges for the connection of the water supply by the Jabatan Kerja Raya and towards the quit rent and assessment of the land in question.

The verification of the cause of action was not set out in clear and definite terms but I think the plaintiff's assertions in his affidavit in support of his claim for specific performance could be taken as a sufficient verification of the cause of action within the provisions of Order 14A. But nowhere in the affidavit in support of his application for summary judgment nor in his further affidavit in reply to the defendants' affidavit did the plaintiff state that in his belief there was no defence to the action.

The defendants resisted the plaintiff's application for summary judgment. They raised the two points which they had contended in their defence. In his affidavit their managing director admitted that an agreement was signed between the plaintiff and the defendants for the sale of land and for the construction of a house on it but stated that the agreement was subject to an implied condition precedent that time would begin to run only from the date when the District Council granted the permit to begin the construction work. This permit was necessary before the construction work could begin and it was issued as late as November 29, 1977. Secondly he stated that by the time they received the permit the cost of building materials had escalated out of all proportion and it was impossible to complete the building at the price agreed upon. The defendants informed the plaintiff and his solicitors of the situation and invited the plaintiff to come to some amicable terms. The plaintiff refused and insisted that the defendants should complete the work at the original agreed price. The managing director stated further that the current state of affairs was not brought about by the negligence, default or incompetence of the defendants. He said that the defendants had a good defence to the plaintiff's claim. It was neither frivolous nor vexatious but was a *bona fide* defence which raised triable issues involving important questions of law and facts.

I accepted the defence submission. In my view the defendants had succeeded in showing cause against the plaintiff's application for summary judgment. They had disclosed sufficient facts entitling them to defend the action and they had raised issues in the case which ought to be determined by trial.

The case of *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck*[1] was cited by both parties. This case in the court below was determined after trial wherein Dato' Syed Othman J. (as he then was) held that the booking *pro forma* executed by the plaintiff and the defendants who were housing developers was a valid and binding contract between the parties and that the purchase price of the house as stated in the *pro forma* could not be validly increased by the developers. He accordingly ordered specific performance of the plaintiff's claim and directed that the property be transferred to the plaintiff upon payment of the balance of the purchase price as agreed upon in the *pro forma*. This decision was upheld by the Federal Court.

In the present case before me the defendants were contending that there was an implied condition precedent that time for the completion of the house would only commence to run when they received permission

to do so from the District Council. Whether there was any valid and implied condition precedent and what its effect would be on the sale agreement were I think triable issues amounting to a *bona fide* defence on the merits. The defendants had also only recently received an extension of the developers' licence under section 5 of the Housing Developers (Control and Licensing) Act 1966. This document which was produced at the hearing by Mr. Thara Singh Sidhu for the defendants was dated May 24, 1978 and it showed that the Controller of Housing had extended the licence to February 23, 1980.

The second issue raised by the defendants was that for reasons beyond their control the cost of building materials had escalated to such an extent as to make it unreasonable and impossible for the defendants to erect the house at the agreed price. The case of *Daiman* appears to go against this contention. However reading the judgment of the High Court and that of the Federal Court in *Daiman's* case it would appear that the decision on this point evolved on the construction and interpretation of the brief booking *pro forma* and of the relevant provisions of the Housing Developers (Control and Licensing) Rules 1970. The provisions in the agreement of sale in the present case are much more elaborate than the short and simple *pro forma* in *Daiman's* case. It will be necessary to consider and construe these provisions after trial in the light of the allegations made by the defendants that there was an implied condition precedent and that the terms of the contract had become unreasonable and impossible to perform because of the increase in the cost of building material. In this context the question of unreasonableness or otherwise or of any undue advantage or disadvantage which may accrue to one or the other party consequent upon the performance of the sale agreement is in my view a contention to be adjudged after trial. It may be noted here that *Daiman's* case was not determined summarily but only after a trial in the usual manner.

Now to revert to the application itself. In his supporting affidavit it was incumbent upon the plaintiff to verify the cause of action and state that in his belief there was no defence to the action. The defendants did not raise any preliminary objection to the plaintiff's affidavit but I myself did point out to Mr. Chua Jui Meng for the plaintiff that in the plaintiff's affidavits there appeared to be no verification of the cause of action nor a statement that there was no defence to the action. Mr. Chua Jui Meng said he was quite satisfied with the plaintiff's affidavits and submitted that they complied with Order 14A. I am afraid I cannot agree.

To enable the court or a judge to hear any application for summary judgment under Order 14 or Order 14A, in other words, to give the court or a judge jurisdiction to hear the application, three conditions must be satisfied in the supporting affidavit. First the affidavit must be made by the plaintiff or by any other person who can swear positively to the facts, secondly the deponent must verify the cause of action and thirdly he must state in the affidavit that in his belief there is no defence to the action. The clear provisions of Order 14 rule 1(a) and Order 14A rule 1(1) are mandatory and they must be complied with if a plaintiff wants to get judgment without any trial whatsoever. In the present case the plaintiff had complied with the first two conditions but not the third condition for he had failed to say on affidavit that in his belief there was no defence to the action. The plaintiff's application for summary judgment under Order 14A was therefore deficient for want of compliance with rule 1(1) of the Order and ought to have been dismissed *in limine*.

I dismissed the application. But as I had in fact heard the application and had formed the opinion that the defendants had disclosed sufficient facts entitling them to defend the action I gave them unconditional leave to defend.

Order accordingly.

Solicitors: *Chua Bros.; M.S. Miranda & Co.*

PUBLIC PROSECUTOR v. MOHAMED NOOR JANTAN

[A.Cr.J. (Wan Suleiman F.J.) December 15, 1978]
[Kuala Lumpur — Federal Territory Criminal Appeal No. 41 of 1977]

Criminal Law and Procedure — Cautioned statement — Whether admissible in evidence even though not produced by prosecution as part of prosecution case — Internal Security Act, 1960, s. 75 — Corrosive and Explosive Substances and Offensive Ordinance, 1958, s. 6(1) — Supreme Court of Judicature Act, s. 66.

Evidence — Burden of proof on accused is "only a slight one".

The respondent in this case was charged for having in his "possession an offensive weapon, to wit a 'kerambit' knife otherwise than with lawful authority", an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958. At the trial before the Sessions Court, defence counsel produced a cautioned statement which the Investigating Officer had recorded from the respondent. The learned President acquitted the respondent without calling upon him to make his defence. In his Grounds of Judgment he referred to the said cautioned statement in which the accused/respondent had stated that he had bought the knife from a stadium. The learned President had obviously inferred that the accused had the weapon for a lawful purpose and there was no evidence of its use for an unlawful purpose.

The main ground of appeal was whether the said cautioned statement recorded in accordance with section 75 of the Internal Security Act 1960 was admissible in evidence where the prosecution for reasons of their own did not wish to produce it as part of the prosecution case.

Held, dismissing the appeal: (1) since the cautioned statement is substantive evidence defence is at liberty to ask for and secure its admission during the course of the prosecution case. It follows that if after considering the cautioned statement and such other evidence as the prosecution had already adduced, the court finds that there was *prima facie* no case to answer, the court could acquit the accused at that stage;

(2) where a burden is placed on an accused person to prove anything, by statute or common law, the burden is only a slight one and this burden can be discharged by evidence of witnesses for the prosecution as well as witnesses for the defence.

Cases referred to:-

(1) *Re Abdul Latiff* [1960] M.L.J. 198.
(2) *Wong Chooi* v. *Public Prosecutor* [1967] 2 M.L.J. 180.
(3) *Law Tun Wah* v. *Public Prosecutor* [1978] 1 M.L.J. 167.